American International Assurance Co Ltd v Dato Lam Peng Chong & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-04-15 OF 1997
GOPAL SRI RAM, SITI NORMA YAAKOB AND MOKHTAR SIDIN JJCA
9 FEBRUARY 1999

Administrative Law *— Remedies — Certiorari — Application to quash award of Industrial Court — Preliminary objection that respondents were not workmen and Industrial Court lacked jurisdiction — Whether Industrial Court correctly dismissed the objections*

Labour Law *— Industrial Court — Jurisdiction — Allegation that appellants were not workmen — Preliminary objection as to jurisdiction of the court to adjudicate — Objection caused delay — Whether objection should have been entertained*

The respondents had been engaged by the appellant both in the capacities of insurance agents and agency leaders. In 1981, as a result of the respondents' refusal to accept a new contract to replace the existing contract under which they had been engaged as agency leaders, the appellant terminated the respondents' engagement as agency leaders. The new contract contained a clause, not previously found in the old contract, which had the effect of negating any employer/employee relationship between the appellant and respondents. The dispute was referred to the Industrial Court in 1985. Here, the appellant raised a preliminary objection that the respondents were not workmen so that the Industrial Court lacked jurisdiction to adjudicate the dispute. The objection was dismissed and the appellant moved the High Court for certiorari to quash the Industrial Court's award. The appellant appealed when the High Court declined.

Held, dismissing the appeal and directing that the dispute be dealt with speedily upon its merits:

The Industrial Court had correctly applied the test laid down in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 and correctly concluded that the respondents were workmen engaged under contracts of service. The Industrial Court had also correctly concluded that the respondents had been engaged in two capacities, both as agents as well as agency leaders, and had appropriately addressed the respondents' alleged dismissal under the contracts engaging them in the latter capacity (see p 552C–E). Furthermore, the arguments advanced by the appellant in this appeal are in reality criticisms of the facts found by the Industrial Court. A certiorari is given only in cases where an error of law is disclosed and not available to correct erroneous findings of fact made by a public decision-maker (see p 552G–H).

Per curiam:

The preliminary objection as to the threshold jurisdiction of the Industrial Court should not have been entertained as it resulted in a delay of almost 14 years with the critical issues of the case yet to be decided. This grave injustice does not fall within the scheme of the Industrial Relations Act 1967 (see p 553 H–I).

[Bahasa Malaysia summary

Responden-responden telah diambil untuk bekerja oleh perayu di dalam kapisiti mereka sebagai ejen insurans dan juga ketua agensi. Pada tahun 1981, atas keengganan responden-responden untuk menerima kontrak baru untuk menggantikan kontrak yang sedia ada di mana mereka telah diambil kerja sebagai ketua-ketua agensi, perayu telah menamatkan pengambilan responden sebagai ketua agensi. Kontrak yang baru mengandungi fasal, yang tidak didapati di dalam kontrak lama, yang mempunyai kesan menidakkan sebarang hubungan majikan/pekerja antara perayu dan responden-responden. Pertikaian tersebut telah dirujuk kepada Mahkamah Perusahaan pada tahun 1985. Di sini, perayu telah membangkitkan bantahan awal bahawa memandangkan yang responden-responden bukan merupakan pekerja-pekerja Mahkamah Perusahaan tiada bidang kuasa untuk mengadili pertikaian tersebut. Bantahan tersebut dibatalkan dan perayu telah memohon kepada Mahkamah Tinggi untuk suatu certiorari bagi membatalkan award Mahkamah Perusahaan. Perayu telah merayu apabila Mahkamah Tinggi enggan memberikan certiorari yang diminta.

Diputuskan, membatalkan rayuan dan mengarahkan pertikaian tersebut dikendalikan dengan segera berdasarkan merit:

Mahkamah Perusahaan telah memakai dengan betul ujian yang diturunkan di dalam *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 dan telah menyimpulkan secara betul bahawa responden-responden merupakan pekerja yang diambil kerja di bawah satu kontrak perkhidmatan. Mahkamah Perusahaan juga telah menyimpulkan secara betul bahawa responden-responden telah diambil kerja dalam dua kapisiti, kedua-dua sebagai ejen dan juga ketua agensi, dan telah memberikan perhatian sewajarnya terhadap pemecatan responden-responden di bawah kontrak yang mengambil mereka dalam kapasiti yang kedua tersebut (lihat ms 552C–E). Lebih-lebih lagi, hujah-hujah yang dikemukakan oleh perayu dalam rayuan ini adalah dalam realiti kritikan terhadap penemuan fakta-fakta oleh Mahkamah Perusahaan. Satu certiorari hanya akan diberikan dalam kes-kes di mana kesilapan undang-undang telah didedahkan dan tidak terbuka untuk membetulkan kesilapan penemuan fakta-fakta oleh pembuat keputusan awam (lihat ms 552G–H).

Per curiam:

Bantahan awal berkenaan bidang kuasa ambang Mahkamah Perusahaan tidak patut dilayan oleh kerana ia mengakibatkan kelengahan hampir 14 tahun dengan isu-isu kritikal kes masih belum diputuskan. Ketidakadilan serius ini tidak berpadanan dengan skim Akta Perhubungan Perusahaan 1967 (lihat ms 553H–I).]

Notes

For cases on application to quash award of the Industrial Court, see 1 *Mallal's Digest* (4th Ed) paras 60–69.

For cases on jurisdiction, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 943–974.

Cases referred to

Dr A Dutt v Assunta Hospital & Anor [1981] 1 MLJ 304 (refd)

Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor [1995] 3 MLJ 369 (refd)

Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd [1997] 2 MLJ 685 (refd)

Sawarn Singh v State of Punjab AIR 1976 SC 232 (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union [1995] 2 MLJ 317 (refd)

William Jacks & Co (M) Sdn Bhd v S Balasingam [1997] 3 AMR 2585 (refd)

Legislation referred to

Industrial Relations Act 1967 s 20

Appeal from: Originating Motion No R8–32–171 of 1988 (High Court, Kuala Lumpur)

Dominic Puthucheary (*Asmet Nasaruddin* and *Feroz Hussein* with him) (*Puthucheary, Asmet & Feroz*) for the appellant.

KP Gengadharan (*Hector Sankey* with him) (*Genga, Maha Wong & Co*) for the respondents.

Cur Adv Vult

Gopal Sri Ram JCA (delivering judgment of the court): The sole question at issue in this appeal is whether the Industrial Court exceeded its jurisdiction in holding the respondents to be workmen within the Industrial Relations Act 1967 ('the Act'). The background against which that question arises is as follows.

The appellant is a company whose business is life insurance. The respondents were engaged by the appellant in two capacities: as agents and as agency leaders. In the former capacity, the respondents sold policies issued by the appellant to members of the public desirous of having their

lives insured. They derived a commission from the appellant for such sales on a prescribed scale. In the latter capacity, the respondents had diverse duties according to the particular designation each held. The designations were 'Agency Supervisor', 'Agency Manager', 'District Manager', 'Manager' and 'Senior Manager'. The duties of the respondents as agency leaders included the recruitment, training and supervision of agents who were in the business of selling the appellant's policies. In the performance of these duties, the respondents were under the appellant's control and supervision. The appellant paid each respondent emoluments for the performance of their respective duties as agency leaders. Each respondent had two separate contracts with the appellant: an agent's contract and an agency leader's contract. The former contract had a specific provision which negated the creation of an employer/employee relationship. The latter contract did not contain any such term. In 1981, the appellant wanted to replace the existing agency leaders contract with a new contract. This new contract contained an additional clause which had the effect of negating any employer/employee relationship between the appellant and each of the respondents. The respondents were not prepared to accept the new contract. The appellant then terminated their contracts as agency leaders. A dispute arose. The respondents considered themselves to have been dismissed without just cause or excuse. They set in motion the machinery provided by s 20 of the Act. On 8 June 1985, 1 July 1985 and 9 August 1985, the Minister referred the dispute between the parties to the Industrial Court. The parties exchanged pleadings and the matter was set down for hearing on 9 November 1985. At the outset, the appellant took a preliminary objection that the respondents were not workmen so that the Industrial Court lacked jurisdiction to adjudicate upon the dispute. After a hearing that lasted 67 days spread over almost three years, during which evidence was led and comprehensive submissions were made, the learned Chairman of the Industrial Court dismissed the appellant's preliminary objection. In his award dated 31 October 1988, he held that the respondents were workmen within the Act. The appellant then moved the High Court for certiorari to quash the award. The High Court declined certiorari. It is against this refusal that the present appeal has been brought.

In support of the appeal, Dato Dominic Puthucheary, counsel for the appellant argued that the Industrial Court fell into error because it misunderstood the evidence led before it. It is his submission that the totality of the evidence, both oral and documentary, reasonably supports the conclusion that the respondents were independent contractors engaged under contracts for services and not workmen employed under contracts of service. Counsel submits that the agency leader's contract of each of the respondents had merged into the agency contracts that they had with the appellant so that in truth and fact each respondent had only one contract with the appellant. That single contract excluded any relationship of employee so that the respondents were at all material times independent contractors of the appellant. He says that if the award in the present case is permitted to stand, it would have a serious impact upon the insurance

industry because persons in the like position of the instant respondents who have been traditionally regarded by insurance companies as independent contractors will now be held to be workmen. It was submitted that the High Court had therefore erred in refusing to issue certiorari to quash the award of the Industrial Court.

Encik Gengadharan who appeared for the respondents has argued that the award of the Industrial Court is not flawed by any error of law. That court had proceeded to determine whether the respondents were independent contractors engaged under contracts for services or whether they were persons who had been employed under contracts of service. The Industrial Court therefore asked itself the right question. In arriving at its conclusion that the respondents were workmen under the Act, the Industrial Court had regard to the particular factual matrix, the admissions made by the appellant through its witnesses as well as in its documents and the nature of the engagement in the circumstances of the present case. The Industrial Court therefore took into account only relevant considerations when making its award. Further, any reasonable tribunal similarly circumstanced would have come to the same conclusion so that the decision arrived at is not tainted by 'Wednesbury unreasonableness'. Encik Gengadharan has also argued that if the appellant's invitation to intervene be accepted by this court, it would be an unwarranted exercise of appellate jurisdiction over the Industrial Court, whereas what the present appeal is concerned with are certiorari proceedings.

Having considered the arguments advanced by both sides and having carefully read the voluminous records of appeal provided to us, we have come to the conclusion that this appeal must fail. There are several reasons for our decision.

First, the issue whether a person is a workman as defined by the Act depends upon the nature of the engagement in a given case. A person is a workman if he is engaged under a contract of service. But he is an independent contractor and therefore not a workman if his engagement is pursuant to a contract for services. The point has been concluded by binding authority.

In *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* [1995] 3 MLJ 369 at p 391, the Federal Court laid down the applicable test in the following terms:

> In our judgment, the correct test to be applied in determining whether a claimant is a workman under the Act is that enunciated by Chang Min Tat FJ in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 at p 311. We accordingly hold that a workman under the Act is one who is engaged under a contract of service. An independent contractor who is engaged under a contract for services is not a workman under the Act. We take this view because it provides, as earlier observed, for a flexible approach to the determination of the question. It is fairly plain to see why flexibility is achieved by having resort to this test.
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> In all cases where it becomes necessary to determine whether a contract is one of service or for services, the degree of control which an employer

exercises over a claimant is an important factor, although it may not be the sole criterion. The terms of the contract between the parties must, therefore, first be ascertained. Where this is in writing, the task is to interpret its terms in order to determine the nature of the latter's duties and functions. Where it is not then its terms must be established and construed. But in the vast majority of cases there are facts which go to show the nature, degree and extent of control. These include, but are not confined, to the conduct of the parties at all relevant times. Their determination is a question of fact. When all the features of the engagement have been identified, it becomes necessary to determine whether the contract falls into one category or the other, that is to say, whether it is a contract of service or a contract for services.

In the present instance, the Industrial Court applied the test laid down in the foregoing passage. After examining the totality of the evidence before it and after considering all the features of the several agency leader's contracts the Industrial Court concluded that the respondents had been engaged under a contract of service. The Industrial Court also correctly concluded that the respondents had been engaged in two capacities, both as agents as well as agency leaders. It was the contract for the latter engagement that was the subject matter of the alleged dismissal. And it was with the nature of the engagement under the latter contract that the Industrial Court was concerned. We are therefore in agreement with the submission of counsel for the respondents that the Industrial Court adopted the correct approach, asked itself the right question and took into account relevant considerations when making the impugned award. It follows that the award under challenge does not contain any error of law in the wider *Anisminic* sense. See *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317. The Industrial Court did not therefore exceed its jurisdiction.

Second, it is clear from the decisions in *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304 and *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia & Anor* that the question whether a person is a workman is one of mixed law and fact for the Industrial Court to decide. 'The fact is the ascertainment of the relevant conduct of the parties under their contract and the inference proper to be drawn therefrom as to the terms of the contract and the question of law, once the terms have been ascertained, is the classification of the contract for services or for (sic) service': (per Chang Min Tat FJ in *Dr A Dutt v Assunta Hospital* at pp 310–311).

It is well settled that certiorari is given only in cases where an error of law is disclosed. The remedy is not available to correct erroneous findings of fact made by a public decision-maker. See *William Jacks & Co (M) Sdn Bhd v S Balasingam* [1997] 3 AMR 2585; *Sawarn Singh v State of Punjab* AIR 1976 SC 232.

In the present instance, the arguments advanced in support of the appeal are in reality criticisms of the facts found by the Industrial Court. It is therefore not permissible to issue certiorari in the circumstances of the present case.

Although counsel did not specifically address the point, there is one other matter of which we must make mention in the present context. Even

A if the appellant's attack upon the award in the present case is to be read as being grounded upon *Wednesbury* unreasonableness, we are satisfied that any reasonable tribunal would, upon the findings of fact made by the Industrial Court, which it was perfectly entitled to make, have come to the same conclusion, namely, that the contracts that the respondents had with the appellant were contracts of service.

B

Lastly, there is in our view a point of principle that stands in the way of the appellant which is the result of jurisprudence that has flowed since the judgment appealed from. In *Kathiravelu Ganesan & Anor v Kojasa Holdings Bhd* [1997] 2 MLJ 685, the Federal Court held that the taking of a preliminary objection as to the threshold jurisdiction of the Industrial C Court, as was done in the instant case, does not fall within the scheme of the Act and should not, save in a limited class of case, be countenanced. The relevant passages in the judgment in that case appear at pp 697–699 of the report. The passage at p 697 reads as follows:

> D We are of the view that, having regard to the general scheme of the Act, Parliament did not intend a threshold jurisdiction challenge before the Industrial Court by way of a preliminary objection, for the legislature's paramount concern in passing the Act was to ensure speedy disposal of industrial disputes. And permitting preliminary objections to the threshold jurisdiction being taken will only delay industrial adjudication.

E The second passage (at p 699) reads:

> It follows that in all cases where a party to a trade dispute intends to question the threshold jurisdiction of the Industrial Court to make an adjudication, save upon the limited ground that the representations under s 20(1) were made out of time, he must do so by seeking to quash, by certiorari, the Minister's reference and, in the same proceedings, seek an order of prohibition F against the Industrial Court from entertaining the dispute upon the ground that the latter has no jurisdiction to make an adjudication. Where a challenge is not thus taken, the Industrial Court must be permitted to decide the dispute to conclusion and in the process to deal with the jurisdictional question, eg whether the particular claimant is or is not a workman or whether the matter involves the exercise of extra-territorial jurisdiction. On no account ought G such matters to be taken or dealt with as preliminary objections. Any other course would, as we have earlier observed, obstruct a speedy disposal of a trade dispute and thereby cut across the spirit and intendment of the Act.

Although these views were expressed in the context of an application for an order of *prohibition*, we consider them to be equally applicable to *certiorari*.

H We have before us yet another instance illustrative of the grave injustice that ensues when a preliminary objection is entertained by the Industrial Court. Here is a case where the Minister made the reference in 1985. Now, after the passage of almost 14 years, all we have is a finding that the respondents are workmen. The other critical issues, whether the respondents were dismissed and whether their dismissal was for just cause, I are yet to be decided. Most surely, this cuts across the very purpose for which Parliament passed the Act.

The learned judge in the High Court was, for the reasons given in this judgment, entirely correct in refusing the appellant the relief it claimed. The appeal is dismissed. The orders made in the court below are affirmed. The matter is remitted to the Industrial Court with a direction to speedily dispose of the dispute in question upon its merits. The appellant must pay the costs of the appeal to the respondents. The deposit paid into court shall be paid out to the respondents to account of their taxed costs.

Appeal dismissed.

Reported by Joel Ng